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6                   **UNITED STATES DISTRICT COURT**  
7                   **WESTERN DISTRICT OF WASHINGTON**  
8                   **AT SEATTLE**

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DAVID MUNGAI NJENGA,	)	
	)	
Petitioner,	)	Case No. C11-847-JLR-BAT
	)	
v.	)	
	)	
NATHALIE ASHER, Seattle Field Office	)	<b>REPORT AND</b>
Director, United States Immigration and	)	<b>RECOMMENDATION</b>
Customs Enforcement,	)	
	)	
Respondent.	)	

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14                   On February 15, 2011, petitioner, proceeding *pro se* and *in forma pauperis*, filed his sixth  
15 Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241, which challenged the  
16 lawfulness of his continued detention under 8 U.S.C. § 1231(a)(6) pending a stay while the  
17 United States Court of Appeals for the Ninth Circuit decides his appeal of the denial of his  
18 motion to reopen. *Njenga v. Asher*, No. C11-265-JLR-BAT (Dkt. No. 6). On April 22, 2011, the  
19 Court granted the government's motion to stay briefing case until 45 days after the issuance of  
20 the mandate in *Diouf v. Napolitano*, \_\_ F.3d \_\_, 2011 WL 768077 (9th Cir. March 7, 2011),  
21 finding the case potentially dispositive of the habeas corpus action. *Id.* at Dkt. No. 18. On May  
22 3, 2011, petitioner filed a motion for voluntary dismissal of his habeas petition, which the Court  
23 subsequently granted. Dkt. Nos. 22 and 25.

1       On May 19, 2011, petitioner filed his seventh and instant Petition for Writ of Habeas  
2 Corpus, challenging the lawfulness of his continued detention pending a stay while the Ninth  
3 Circuit decides his appeal of the denial of his motion to reopen. Dkt. No. 6. The Court  
4 subsequently directed respondent to file a return and status report (“RSR”) to the habeas petition.  
5 Dkt. No. 7.

6       On June 23, 2011, respondent filed a motion for stay of briefing pending issuance of the  
7 mandate in *Diouf*. Dkt. No. 12. In *Diouf*, the Ninth Circuit recently held that aliens who are  
8 detained beyond six months under 8 U.S.C. § 1231(a)(6) and who received a stay while pursuing  
9 a petition for review of the denial of a motion to reopen by the Board of Immigration Appeals  
10 (“BIA”), are entitled to a bond hearing before an immigration judge at which the government  
11 bears the burden of showing that the alien poses a flight risk or a danger to the community.  
12 *Diouf*, \_\_ F.3d \_\_, 2011 WL 768077. In reaching this conclusion, the Ninth Circuit held that the  
13 180 day post-order custody review process afforded by the immigration regulations was  
14 insufficient to “address the serious constitutional concerns raised by continued detention.” *Id.* at  
15 9. The government has filed a petition for rehearing en banc of that decision with the Ninth  
16 Circuit Court of Appeals, which remains pending.

17       Respondent asserts that *Diouf* directly affects the outcome of petitioner’s current habeas  
18 petition, and requests that the Court grant a stay of the briefing schedule and continue the filing  
19 date of the RSR until 45 days after issuance of the mandate. Dkt. 12 at 2. She contends that “[i]f  
20 the parties are required to proceed with briefing at this time, there is a strong likelihood that  
21 further briefing will be sought once the mandate in *Diouf* is issued.” *Id.* at 3.

22       Because *Diouf* is potentially dispositive of this case and because any delay will be  
23 limited, the Court recommends that respondent’s motion for stay of briefing pending issuance of

1 the mandate in *Diouf* be granted. A proposed order accompanies this Report and  
2 Recommendation.

3 DATED this 28th day of June, 2011.

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7 BRIAN A. TSUCHIDA  
United States Magistrate Judge

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